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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 91(e))
OR OTHERWISE ADOPT A NEW) Supreme Court No. XXX
RULE FOR THE AOC IN THE RULES)
OF THE SUPREME COURT OF)
ARIZONA

Pursuant to Rule 28 of the Rules of the Supreme Court, Mike Palmer, a person "interested . . . in the adoption, amendment . . . of a court rule" respectfully petitions this Court to either amend Rule 91(e) of the Rules of the Supreme Court of Arizona to require superior court clerks to report 60-day Rule violations to the Commission on Judicial Conduct, or, in lieu, adopt a new Rule to require the Supreme Court's own Administrative Office of the Courts Finance Office to report 60-day Rule violations to said Commission. A four year delay in judicial discipline, which finally resulted in the recent resignation of former Superior court judge Howard D. Hinson, Jr. (Yavapai County), highlights the need for this amendment or new rule.

I. Background. Article VI, Section 21 of the Arizona Constitution, which codifies our right to a speedy trial, requires Superior court judges rule on any matter within 60 days. Unfortunately, this Constitutional requirement is essentially toothless, as there are no immediate consequences for violating it. Aside from his oath to God to support the Constitution of the State of Arizona and faithfully and impartially discharge the duties of office, there is nothing to force a judge to abide by the 60-day Rule.

Fortunately, the Arizona State Legislature tried to put some teeth into this Constitutional

requirement by passing A.R.S § 12-128-01. As it pertains here, that law says "A superior court judge shall not receive his salary unless such judge certifies that no cause before such judge remains pending and undetermined for sixty days after it has been submitted for decision . . ." In other words, a judge's salary is not due him if he has any matters overdue.

Unfortunately, the Legislature gummed up the works. It left it to judges to self-certify that "no cause has been submitted to me for decision which remains pending and undetermined for sixty days or more since the date of submission for decision." In other words, a judge essentially issues his paycheck to himself. The Legislature overlooked the obvious fact that self-certification only works when everyone plays by the rules. It does not catch rule breakers, by definition. A bad judge will falsify his affidavit to the Court, as we'll see.

Fortunately, the Arizona Supreme Court provides some oversight the Legislature did not. Supreme Court Rule 91(e) calls for each Superior court clerk to "report to the Administrative Director of the Courts, in writing, on the last day of March, June, September and December, in each year, all matters in that court submitted for decision sixty days or more prior to the date of such report and remaining undecided on the date of the report."

Unfortunately, as it stands now, the clerk is not strictly required by law to (and, practically speaking, does not) notify the Commission on Judicial Conduct if she finds a judge has committed judicial misconduct by violating the 60-day Rule. Nor is the Supreme Court's AOC Finance Office strictly required to act, even though it is arguably more culpable than the clerk, since it has the data to know when a judge has violated the 60-Rule AND the data to know when a judge lied to the Supreme Court about it.

In the recent case of former judge Hinson, the Commission on Judicial Conduct, acting

on a citizen's complaint, found the judge had violated the Arizona Constitution's 60-day Rule at least 25 times in three consecutive years. He falsified his monthly salary certifications regarding same at least 11 times in the same period. (See Exhibit 1, attached.) As a result of his misconduct, judge Hinson resigned from office in the Fall of 2009, almost a year after a complaint was filed.¹

II. The need. Shouldn't someone within the judiciary have reported this before a concerned citizen became involved? Nothing happened for three years. The system needs to be fixed. Let's start at the top and work down to see what can be done.

Judge Hinson's presiding judge in Yavapai County (R.M.B.), who presumably would know of the violations, was obligated at some point to file a complaint of judicial misconduct against his subordinate, pursuant to Supreme Court Rule 81, the Code of Judicial Conduct. (Canon 3(D)(1) in the old Code, Rule 2.15(A) in the new.) Nevertheless, according to the Commission's report, the presiding judge did not file a complaint during his subordinate's three year "crime" spree.²

Likewise, State Bar Ethics Rule 8.3(b) requires attorneys to report judicial misconduct to the appropriate authorities. But the record shows no attorney filed a complaint with the Commission against Judge Hinson in the three years the judge violated their client's constitutional right to a speedy trial. Whether any attorney complained to the presiding judge I

¹ See http://www.supreme.state.az.us/ethics/Press_Releases/Hinson_press_release.pdf and http://www.supreme.state.az.us/ethics/Complaints/2008_Complaints/Hinson_08-3080001.pdf

² Interestingly, the Presiding judge was a member of the Commission during that time.

cannot know. (If so, that would make the presiding judge more culpable to report.)³

The Yavapai County Superior court clerk had at least part of this picture, but she did not file a complaint. As auditor of the Quarterly reports, she knew of former judge Hinson's numerous and egregious violations of the 60-day Rule. (See Exhibit 1, attached.) As she is an officer of the court, I submit she had a duty to report these violations to the Commission. But if it's not spelled out in the law, there's wiggle room for nonfeasance.

To get some insight about this, I spoke with a retiring subordinate in a different county who actually performed the audits. She said they called these Quarterly audits "tattletale reports." (Note the stigma. Nobody in the system wants to be a tattletale.) When I asked if she felt any obligation to report 60-day Rule violations to anyone, she said, "No." She felt her only duty simply was to compile the data and, typical of bureaucracies, "pass it on." (And "pass on it.")

If the Superior court clerk sees the judge's Monthly Salary Certifications go by as they are filed with the AOC Finance Office and so knows when a judge is falsifying his affidavits, I submit she is even more duty bound—not only to the court, but as a publically elected official, to the citizenry—to report what she knows. Especially since falsifying an affidavit (false swearing), defrauding the State, engaging in fraudulent schemes, etc. are felonies. (Although no law enforcement agency, including the State A.G., has yet to act on the Commission's information regarding judge Hinson.)

Last in the chain, the Supreme Court's AOC Finance Office has all the data, being the keeper of both judges' Monthly Salary Certifications and the court clerks' Quarterly Audits.

³ I heard that one attorney filed more paper with judge Hinson when a ruling was overdue, but this does not meet the requirement of E.R. 8.3(b) to report misconduct.

While not officers of the court, they are an office of the court.⁴ As such, they are duty bound by the Arizona Code of Conduct for Judicial Employees. There, in Canon 3, Item H, Duty to Report, we read, "Judicial employees shall report to a supervisor, administrator, or judge within the judicial department any violation of the law or this code by another judicial employee."

A 60-day Rule violation is a violation of Constitutional law. You can't get higher than that. As Superior court judges are judicial employees, it seems the Code for Judicial Employees already calls for them to report judicial misconduct when it sees incontrovertible evidence of judicial misconduct as was the case with former judge Hinson. But they did not act. (Their Code may not be binding law, as Rule 81 is for judges. Even if it is binding, if a duty is not clearly spelled out in the law, there's wiggle room for nonfeasance.)

So, in spite of all these layers of ostensible oversight, no one in the system reported judge Hinson to the Commission. What to do? The language in the Code of Conduct for Judges and State Bar E.R. 8.3(b) for attorneys is already clear. No change here will stop nonfeasance at the high levels. Therefore, I propose the Court needs to clearly spell out this duty clearly so that lower level staff know when they must act.

III. Proposed change. I propose Rule 91(e) be amended to specifically require Superior court clerks to automatically report violations of the Arizona Constitution's 60-day Rule to the Commission on Judicial Conduct. Also, when a clerk learns a judge has violated the 60-day Rule, the court clerk should be instructed to pull the judge's monthly Certification to see if he reported accurately to the court. If he falsified his affidavit, that information should automatically be

⁴ Is the Director of the Courts an officer of the court? If yes, wouldn't his duty extend over the Finance Office?

included in the clerk's complaint.

Alternatively, the Court could adopt a new rule, say 91(j), clearly spelling out the same trigger to automatically file a complaint, but by the AOC Finance Office instead of Superior court clerks. The Finance Office has easy physical access to both the Superior court clerks' Quarterly audits and judges' Monthly Certifications. Since the staff of the AOC is unelected (in contrast to Superior Court clerks), perhaps this is the preferred (prudent) solution, practically and politically speaking.

Last, while the Legislature allowed exceptions for physical disability in its law regarding payment of salary (A.R.S § 12-128-01), the Constitution says nothing about physical disability as a reason for not complying with the 60-day Rule. Because matters of physical disability are under the purview of the Commission, all violations of the 60-day Rule must be reported to the Commission for independent oversight. Therefore, if the Court amends or adopts a new Rule per this petition, the rule should not make exception for physical disability.

RESPECTFULLY SUBMITTED this 8th day of January 2010.

By Mike Palmer

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Judge Hinson's 60-day Rule violations at a Glance

Rev. B

All violations recorded since appointment to October 2008.

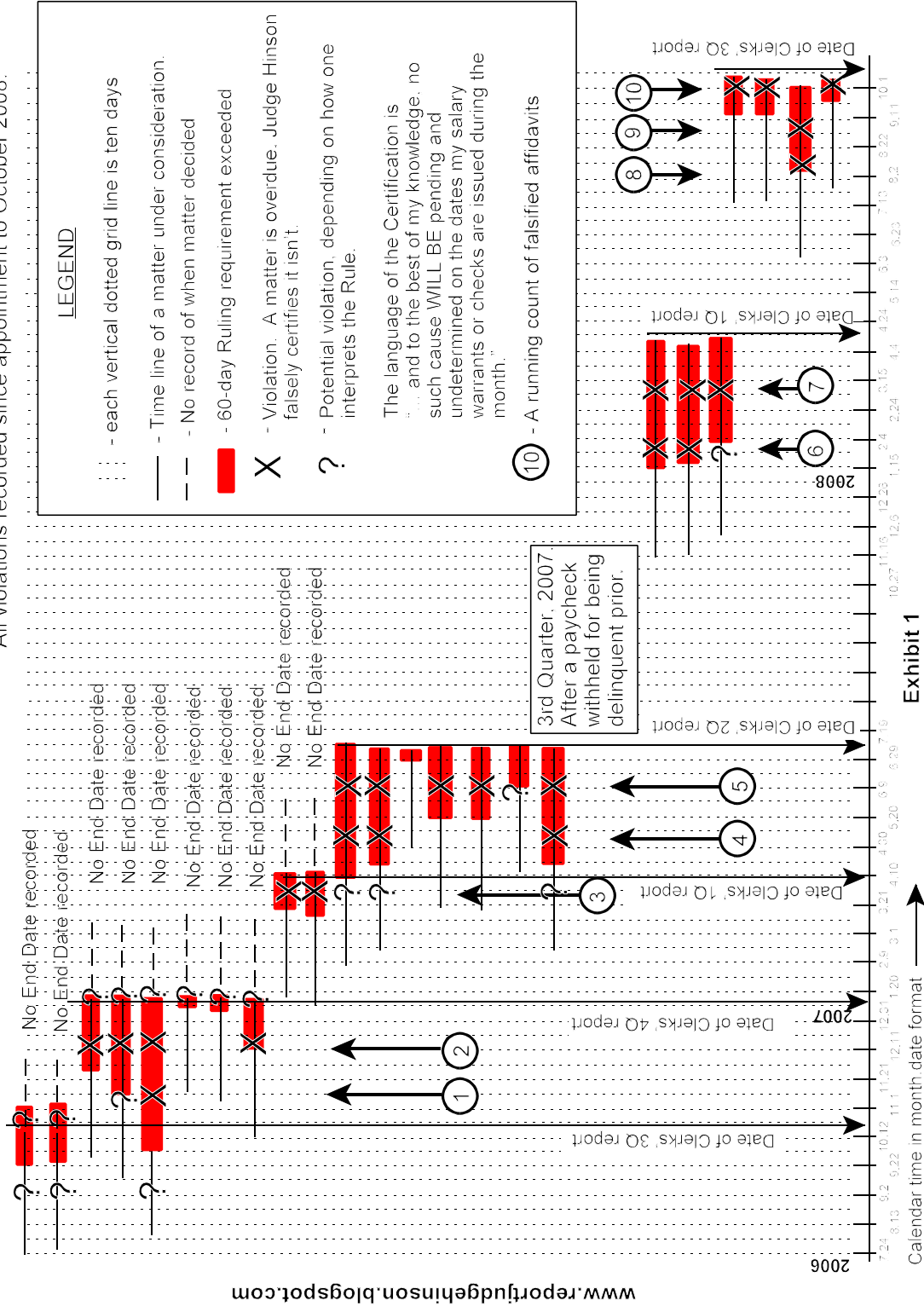


Exhibit 1